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MIL v MON and another application

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24F-21–01 OF 2019 AND WA-24F-280–09 OF 2023
EVROL MARIETTE PETERS J
28 FEBRUARY 2024

C *Family Law — Children — Custody — Determination of custody, care and control of child born out of wedlock — Application by child's mother to vary court order seeking guardianship, custody, care, and control of child previously granted to child's father — Demise of one parent — Whether a surviving parent should be granted guardianship — Whether there were material changes in circumstances to* D *justify allowing variation application — Whether variation application procedurally flawed — Whether court functus officio*

Family Law — Children — Custody — Determination of custody, care and control of child born out of wedlock — Application for custody of child by child's half sister — Whether granting guardianship, custody, care, and control of the child to child's half sister in best interest of child's welfare — Whether child's half-sister had financial stability to support child — Whether child dependant on child's half-sister — Whether custody application of child's half-sister ought to be F *allowed — Whether court should subject child to further interview by judge*

The focal point of contention revolved around a child born out of wedlock. Both the child's biological mother, MON, and half-sister, GEL, had filed respective applications each seeking guardianship, as well as custody, care, and G control of the child. The applicant in Originating Summons 21 (OS No 21) was MIL, the father of three children born from his marriage to one Madam Ong. The three children were his daughter ('GEL'), and two sons ('the siblings'). GEL was the applicant in Originating Summons 280 ('OS No 280'). The narrative began in 2010, when MIL and his then personal assistant, H MON, commenced a romantic relationship. At that time, MIL was separated from Madam Ong. Subsequently, MIL and MON began cohabiting, and subsequently, they welcomed a daughter ('the child') into their lives. MIL then purchased a two-storey semi-detached house ('the family home') whereby MIL, along with MON, the child, GEL, and the siblings, relocated to the family I home. They cohabited in the family home several years. However, at one point, MON departed from the household. This led MIL to file an application seeking guardianship, custody, care, and control of the child on the ground that MON had left the family home, abandoning the child. On the other hand, MON filed a similar application under Originating Summons 27 ('OS No 27')

which resulted in MON securing an interim custody, care, and control of the child through an ex parte application. However, MIL successfully applied to set aside that interim order, resulting in the child's return to the family home. Ultimately, the court issued a comprehensive order ('the court order'), granting MIL both guardianship and custody, along with care and control of the child. Following MIL's death, his wife, Madam Ong, assumed the role of administratrix of MIL's estate ('the administratrix'). The child continued to reside at the family home under the care of GEL and the siblings. A year later, MON filed an application to vary the court order ('the variation application') seeking guardianship, as well as custody, care, and control of the child. In response, GEL filed an application also for, guardianship, custody, care, and control of the child ('the custody application'). There were several procedural objections raised by GEL, namely: (a) whether the variation application was flawed; and (b) whether the court was functus officio after the court order was granted. On merits, the issues raised for consideration in the variation application was to assess whether there existed material change in circumstances, whilst the primary concern in the custody application centred around determining whether granting guardianship, custody, care, and control of the child to GEL was in the best interest of the child's welfare. A further issue that was raised for consideration was whether the child should have been interviewed by the judge.

Held, dismissing the variation application; allowing the custody application:

(1) The procedural objections raised by GEL based on perceived flaws in the variation application arguing that considering MIL's demise, who originally initiated OS No 21, MON should have sought a substitution of MIL with the administratrix, and that mere service by MON of the notice of application for the variation application and affidavit in support thereof upon the administratrix was insufficient as it did not amount to substitution of the parties, was untenable. Given that the administratrix had responded to the notice of application by confirming in an affidavit tambahan, that the administratrix had granted consent and authorisation to GEL to file an affidavit in reply to MON's affidavit in support of the variation application. This by itself was indicative that the administratrix had submitted to the jurisdiction of the court. As such, while the counsel for GEL may be technically correct regarding procedural matters, it was necessary to dismiss the objection (see paras 17–20).

(2) GEL's contention that, in the absence of either an appeal or an application to set aside the court order, the court had become functus officio, and was precluded from entertaining the variation application was lack of merit. In family proceedings, an application to vary was permissible under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform (Marriage and Divorce) Act'). Section 96 of the

Law Reform (Marriage and Divorce) Act applied specifically to family proceedings where an interested party was allowed, at any time, and from time to time, to apply for variation of court orders pertaining to spousal and child maintenance, as well as child custody. Other provisions applicable to variation applications in family proceedings were ss 83, 84, and 97 of the Law Reform (Marriage and Divorce) Act. MON, therefore, was at liberty to file the variation application (see paras 22–25).

(3) MON had argued that the demise of MIL alone warranted granting guardianship, as well as custody, care, and control to her as the surviving parent based on s 6 of the Guardianship of Infants Act 1961 ('Guardianship of Infants Act'). However, s 6 of the Guardianship of Infants Act did not inherently trigger an automatic reversion of guardianship to MON. The inclusion of the phrase 'subject to this Act' within the section underscored that the court must examine the facts and circumstances of each case. It necessitated an application of legal principles governing family proceedings in determining whether MON should be granted guardianship of the child. In fact, s 11 of the Guardianship of Infants Act explicitly mandated the court to prioritise the welfare of the child in its deliberations. Therefore, the court was obliged to take into account both the occurrence of material change in circumstances, and the welfare of the child (see paras 33–36).

(4) The mere demise of MIL did not constitute a material change in circumstances. The child had consistently resided with MIL, GEL, and the siblings, receiving care from both MIL and, subsequently, GEL. It remained undisputed that GEL continued providing financially for the child's needs following MIL's demise. Also, contrary to MON's assertion that the child had been excluded from the list of MIL's beneficiaries, it was undisputed that the child had indeed been included among the beneficiaries of MIL, as evidenced by the application filed in originating summons. Even if the child was excluded from MIL's list of beneficiaries, that fact alone did not constitute a material change in circumstances or even suggest a compromise in the child's welfare (see paras 38–40).

(5) In assessing both the variation application and custody application, the court found it imperative to take into account the welfare of the child, which was the 'golden thread' throughout these proceedings. It was evident that GEL possessed the financial resources to adequately support the child. In contrast, MON, a single mother responsible for supporting her son from a previous relationship, failed to disclose her monthly salary and employment details. This omission raised concerns, as there was a high probability that MON lacked the financial means to maintain the child's accustomed lifestyle provided by GEL. Furthermore, the child's consistent presence in the family home, except

for a brief period when MON obtained custody, highlighted the significant role GEL played in the child's physical, emotional, and mental development. Although MON continued to have access to the child, it was undeniable that the child remained dependent on GEL (see paras 42 & 47–48).

(6) Based on the evidence adduced, the child's current environment was satisfactory. She not only had the presence of GEL, but she also had the support of the siblings and their family. Doubts, however, arose regarding the suitability of MON's home environment for the child's wellbeing. Unlike GEL, who provided evidence through photographs of her living arrangements, MON failed to demonstrate any arrangements ensuring a comfortable, conducive, and stable living environment for the child. This lack of evidence raised legitimate concerns about the proposed living conditions under MON's care. The court had to prioritise ensuring a secure, sanitised, and safe environment for the child's upbringing. Regrettably, MON had failed to demonstrate her ability to provide such an environment for the child (see paras 49–50).

(7) MON had allegedly coerced the child into fabricating a false police report, accusing MIL of molesting the child, leading to MIL's police detention. This grave accusation prompted comprehensive medical and psychological examinations of the child, who later confessed to lying about the alleged molestation. The child openly admitted to the presiding judge that she had been influenced by MON to make false accusations, to bolster MON's custody battle with MIL. This raised serious concerns, especially considering the gravity of sexual abuse allegations in matrimonial proceedings. While the child's admission ultimately vindicated MIL, the incident shed light on MON's willingness to manipulate the child and resort to extreme measures, even at the expense of someone's reputation, to achieve her objectives. Such behaviour painted a troubling picture of MON's character and underscored the potential repercussions of her actions on custodial matters. Hence, the variation application should be dismissed and the custody application allowed (see paras 52–54).

(8) Judges were not obligated to conduct interviews with children. However, in the current context, the request for a judicial interview originated from MON, while GEL exhibited clear hesitancy. Additionally, the child had already gone through an interview by the previous judge in OS No 27, and it was imperative for the court to exercise caution in not unnecessarily involving the child in the legal complexities. Considering the challenges the child had previously encountered, the court opted against conducting an interview. In conclusion, there existed no material change in circumstances to justify allowing MON's variation application. Conversely, GEL's custody

application was granted, as it aligned with the best interests and welfare of the child (see paras 57–59 & 60–61).

[Bahasa Malaysia summary

Fokus utama pertikaian berkisar tentang anak yang dilahirkan luar nikah. Kedua-dua ibu kandung kanak-kanak itu, MON, dan kakak tiri, GEL, telah masing-masing memfailkan permohonan untuk mendapatkan hak jagaan, serta penjagaan, pemeliharaan dan kawalan kanak-kanak itu. Pemohon dalam Saman Pemula 21 (OS No 21) adalah MIL, bapa kepada tiga orang anak yang dilahirkan daripada perkahwinannya dengan seorang Puan Ong. Tiga anak itu adalah anak perempuannya ('GEL'), dan dua anak lelaki ('adik-beradik'). GEL adalah pemohon dalam Saman Pemula 280 ('OS No 280'). Naratif bermula pada 2010, apabila MIL dan pembantu peribadinya ketika itu, MON, memulakan hubungan romantis. Pada masa itu, MIL telah berpisah dengan Puan Ong. Selepas itu, MIL dan MON mula bersekedudukan, dan seterusnya, mereka menyambut seorang anak perempuan ('kanak-kanak itu') dalam kehidupan mereka. MIL kemudian membeli sebuah rumah berkembar dua tingkat ('rumah keluarga') di mana MIL, bersama-sama dengan MON, kanak-kanak itu, GEL, dan adik-beradik, berpindah ke rumah keluarga. Mereka tingga bersama di rumah keluarga itu beberapa tahun .Namun, pada satu ketika, MON telah meninggalkan rumah tangga itu. Ini menyebabkan MIL memfailkan permohonan untuk mendapatkan hak jagaan, penjagaan, pemeliharaan dan kawalan kanak-kanak itu atas alasan MON telah meninggalkan rumah keluarga, meninggalkan kanak-kanak itu. Sebaliknya, MON memfailkan permohonan serupa di bawah Saman Pemula 27 ('OS No 27') yang menyebabkan MON memperoleh jagaan, penjagaan dan kawalan interim kanak-kanak itu melalui permohonan ex parte. Bagaimanapun, MIL berjaya memohon untuk mengenepikan perintah interim itu, menyebabkan kanak-kanak itu pulang ke rumah keluarga. Akhirnya, mahkamah mengeluarkan perintah komprehensif ('perintah mahkamah'), memberikan MIL kedua-dua hak jagaan dan penjagaan, bersama-sama dengan pemeliharaan dan kawalan kanak-kanak itu. Selepas kematian MIL, isterinya, Puan Ong, mengambil alih peranan pentadbir harta pusaka MIL ('pentadbir'). Kanak-kanak itu terus tinggal di rumah keluarga di bawah jagaan GEL dan adik-beradik. Setahun kemudian, MON memfailkan permohonan untuk mengubah perintah mahkamah ('permohonan variasi') untuk mendapatkan hak jagaan, serta penjagaan, pemeliharaan dan kawalan kanak-kanak itu. Sebagai balasan, GEL memfailkan permohonan juga untuk, hak jagaan, penjagaan, pemeliharaan dan kawalan kanak-kanak ('permohonan jagaan'). Terdapat beberapa bantahan prosedur yang dibangkitkan oleh GEL, iaitu: (a) sama ada permohonan variasi itu cacat; dan (b) sama ada mahkamah itu functus officio selepas perintah mahkamah itu diberikan. Dari segi merit, isu yang dibangkitkan untuk dipertimbangkan dalam permohonan variasi adalah untuk menilai sama ada wujudnya perubahan material dalam keadaan, manakala kebimbangan utama dalam permohonan jagaan tertumpu pada

penentuan sama ada pemberian hak jagaan, penjagaan, pemeliharaan dan kawalan kanak-kanak kepada GEL adalah demi kepentingan kebajikan kanak-kanak. Isu lanjut yang dibangkitkan untuk dipertimbangkan ialah sama ada kanak-kanak itu sepatutnya ditemu bual oleh hakim.

Diputuskan, menolak permohonan variasi; membenarkan permohonan jagaan:

(1) Bantahan prosedur yang dibangkitkan oleh GEL berdasarkan kelemahan yang dirasakan dalam permohonan variasi dengan alasan bahawa memandangkan kematian MIL, yang pada asalnya memulakan OS No 21, MON sepatutnya memohon penggantian MIL dengan pentadbir, dan penyampaian semata-mata oleh MON notis permohonan untuk permohonan variasi dan afidavit menyokongnya kepada pentadbir tidak mencukupi kerana ia tidak terjumlah penggantian pihak-pihak, adalah tidak boleh dipertahankan. Memandangkan pentadbir telah menjawab notis permohonan dengan mengesahkan dalam afidavit tambahan, bahawa pentadbir telah memberikan kebenaran dan otoriti kepada GEL untuk memfailkan afidavit balasan kepada afidavit MON bagi menyokong permohonan variasi. Ini dengan sendirinya menunjukkan bahawa pentadbir telah menyerahkan kepada bidang kuasa mahkamah. Oleh itu, walaupun peguam untuk GEL mungkin betul dari segi teknikal mengenai perkara prosedur, ia adalah perlu untuk menolak bantahan (lihat perenggan 17–20).

(2) Pendapat GEL bahawa, dengan ketiadaan rayuan atau permohonan untuk mengetepikan perintah mahkamah, mahkamah telah menjadi fungsi officio, dan dihalang daripada memutuskan permohonan variasi adalah kekurangan merit. Dalam prosiding keluarga, permohonan variasi adalah dibenarkan di bawah s 96 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta Membaharui Undang-undang (Perkahwinan dan Perceraian)'). Seksyen 96 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) terpakai secara khusus untuk prosiding keluarga di mana pihak yang berkepentingan dibenarkan, pada bila-bila masa, dan dari semasa ke semasa, untuk memohon variasi perintah mahkamah yang berkaitan dengan nafkah suami isteri dan anak, serta hak jagaan anak. Peruntukan lain yang terpakai untuk permohonan variasi dalam prosiding keluarga ialah ss 83, 84, dan 97 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian). MON, oleh itu, bebas untuk memfailkan permohonan variasi (lihat perenggan 22–25).

(3) MON telah berhujah bahawa kematian MIL sahaja mewajarkan pemberian hak jagaan, serta penjagaan, pemeliharaan dan kawalan kepadanya sebagai ibu bapa yang masih hidup berdasarkan s 6 Akta

Penjagaan Kanak-Kanak 1961 ('Akta Penjagaan Kanak-Kanak'). Walau bagaimanapun, s 6 Akta Penjagaan Kanak-Kanak secara semulajadi tidak mencetuskan pengembalian penjagaan secara automatik kepada MON. Kemasukan frasa 'tertakluk kepada Akta ini' dalam seksyen itu menegaskan bahawa mahkamah mesti meneliti fakta dan keadaan setiap kes. Ia memerlukan penggunaan prinsip undang-undang yang mengawal prosiding keluarga dalam menentukan sama ada MON patut diberikan hak jagaan kanak-kanak itu. Malah, s 11 Akta Penjagaan Kanak-Kanak secara jelas memberi mandat kepada mahkamah untuk mengutamakan kebajikan kanak-kanak dalam pertimbangannya. Oleh itu, mahkamah diwajibkan untuk mengambil kira kedua-dua kejadian perubahan material dalam keadaan, dan kebajikan kanak-kanak (lihat perenggan 33–36).

(4) Kematian MIL semata-mata tidak menyebabkan perubahan ketara dalam keadaan. Kanak-kanak itu secara konsisten tinggal dengan MIL, GEL, dan adik-beradik, menerima penjagaan daripada MIL dan, seterusnya, GEL. Ia tidak dipertikaikan bahawa GEL terus menyediakan kewangan untuk keperluan kanak-kanak itu selepas kematian MIL. Selain itu, bertentangan dengan penegasan MON bahawa kanak-kanak itu telah dikecualikan daripada senarai benefisiari MIL, adalah tidak dipertikaikan bahawa kanak-kanak itu sememangnya telah dimasukkan dalam kalangan benefisiari MIL, seperti yang dibuktikan oleh permohonan yang difailkan dalam saman pemula. Walaupun kanak-kanak itu dikecualikan daripada senarai benefisiari MIL, fakta itu sahaja tidak membentuk perubahan material dalam keadaan atau bahkan mencadangkan kompromi dalam kebajikan kanak-kanak itu (lihat perenggan 38–40).

(5) Dalam menilai kedua-dua permohonan variasi dan permohonan hak jagaan, mahkamah mendapati adalah penting untuk mengambil kira kebajikan kanak-kanak itu, yang merupakan 'benang emas' sepanjang prosiding ini. Terbukti bahawa GEL memiliki sumber kewangan untuk menampung keperluan kanak-kanak tersebut. Sebaliknya, MON, seorang ibu tunggal yang bertanggungjawab menyara anaknya daripada perhubungan terdahulu, gagal mendedahkan butiran gaji dan pekerjaan bulanannya. Pengecualian ini menimbulkan kebimbangan, kerana terdapat kebarangkalian tinggi bahawa MON kekurangan sumber kewangan untuk mengekalkan gaya hidup terbiasa kanak-kanak yang disediakan oleh GEL. Tambahan pula, kehadiran konsisten kanak-kanak di rumah keluarga, kecuali untuk tempoh yang singkat apabila MON memperoleh hak jagaan, menyerlahkan peranan penting yang dimainkan GEL dalam perkembangan fizikal, emosi dan mental kanak-kanak itu. Walaupun MON terus mendapat akses kepada kanak-kanak itu, tidak dapat dinafikan bahawa kanak-kanak itu tetap bergantung kepada GEL (lihat perenggan 42 & 47–48).

(6) Berdasarkan keterangan yang dikemukakan, persekitaran semasa kanak-kanak itu adalah memuaskan. Dia bukan sahaja mendapat kehadiran GEL, tetapi dia juga mendapat sokongan adik-beradik dan keluarga mereka. Keraguan, bagaimanapun, timbul mengenai kesesuaian persekitaran rumah MON untuk kesejahteraan kanak-kanak itu. Tidak seperti GEL, yang mengemukakan keterangan melalui gambar aturan tempat tinggalnya, MON gagal menunjukkan sebarang aturan untuk memastikan persekitaran hidup yang selesa, kondusif dan stabil untuk kanak-kanak itu. Kekurangan keterangan ini menimbulkan kebimbangan yang sah tentang keadaan hidup yang dicadangkan di bawah jagaan MON. Mahkamah perlu mengutamakan memastikan persekitaran yang selamat, bersih dan selamat untuk didikan kanak-kanak. Malangnya, MON telah gagal menunjukkan keupayaannya untuk menyediakan persekitaran sedemikian untuk kanak-kanak itu (lihat perenggan 49–50).

(7) MON didakwa telah memaksa kanak-kanak itu membuat laporan polis palsu, menuduh MIL mencabul kanak-kanak itu, membawa kepada penahanan polis MIL. Tuduhan berat ini menyebabkan pemeriksaan perubatan dan psikologi menyeluruh terhadap kanak-kanak itu, yang kemudiannya mengaku berbohong mengenai dakwaan pencabulan itu. Kanak-kanak itu secara terbuka mengakui kepada hakim bahawa dia telah dipengaruhi oleh MON untuk membuat tuduhan palsu, untuk membangkitkan pertikaian hak penjagaan MON dengan MIL. Ini menimbulkan kebimbangan serius, terutamanya memandangkan beratnya dakwaan penderaan seksual dalam prosiding perkahwinan. Walaupun pengakuan kanak-kanak itu akhirnya membuktikan MIL, insiden itu menjelaskan kesediaan MON untuk memanipulasi kanak-kanak itu dan mengambil langkah melampau, walaupun dengan mengorbankan reputasi seseorang, untuk mencapai objektifnya. Tingkah laku sebegitu menggambarkan watak MON yang merisaukan dan menggariskan kemungkinan kesan tindakannya terhadap perkara penjagaan. Oleh itu, permohonan variasi hendaklah ditolak dan permohonan jagaan dibenarkan (lihat perenggan 52–54).

(8) Hakim tidak diwajibkan untuk menjalankan temu bual dengan kanak-kanak. Walau bagaimanapun, dalam konteks semasa, permintaan untuk temu duga kehakiman berasal daripada MON, manakala GEL menunjukkan keraguan yang jelas. Selain itu, kanak-kanak itu telah pun melalui temu bual oleh hakim terdahulu dalam OS No 27, dan adalah mustahak bagi mahkamah untuk berhati-hati dalam tidak perlu melibatkan kanak-kanak itu dalam kerumitan undang-undang. Memandangkan cabaran yang dihadapi oleh kanak-kanak itu sebelum ini, mahkamah memilih untuk tidak menjalankan temu duga. Kesimpulannya, tiada perubahan ketara dalam keadaan untuk membenarkan permohonan variasi MON. Sebaliknya,

permohonan hak jagaan GEL telah dibenarkan, kerana ia sejajar dengan kepentingan terbaik dan kebajikan kanak-kanak (lihat perenggan 57–59 & 60–61).]

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)
Anna Tay Siew Hong v Joseph Ng Tiong Yong [1995] MLJU 257; [1995] 3 CLJ 717, HC (refd)
Gisela Gertrud Abe v Tan Wee Kiat [1986] 2 MLJ 297; [1985] CLJU 124; [1985] 1 LNS 124, SC (refd)
Lim Hong Bee v Mah Teck Oon [2010] MLJU 264; [2010] 8 CLJ 473, HC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189; [1981] CLJ Rep 182, FC (refd)
Navarajan a/l Subramaniam v Rajeswary a/p Muniandy [2019] MLJU 715; [2019] CLJU 1014; [2019] 1 LNS 1014, HC (refd)
Ng Say Chuan (h) v Lim Szu Ling (w)and another application [2010] 4 MLJ 796; [2010] 10 CLJ 37, HC (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (folld)
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Tan Sherry (P) v Soo Sheng Fatt (L) [2016] MLJU 1264; [2016] 1 LNS 1586, HC (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20; [1987] 1 LNS 77, HC (refd)
Tan Erh Ling v Ong Khong Wooi [2021] MLJU 1583; [2021] 1 LNS 1325, HC (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234; [1977] 1 LNS 138, FC (refd)
Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd [2014] 1 MLJ 422, CA (refd)
WKN v WKN [2024] SGCA 1, CA (folld)
YCC @ JCC v LSY [2006] 7 MLJ 137; [2007] 7 CLJ 207, HC (refd)

Legislation referred to

Guardianship of Infants Act 1961 ss 6, 11
Law Reform (Marriage and Divorce) Act 1976 ss 83, 84, 88(2), (2)(b), 96, 97
Rules of Court 2012 O 15 r 7, O 42 r 13

Sanjeev Kumar a/l Rasiah (with Muhammad Habeebullah bin Muhiddin) (Sanjeev Kumar) in Originating Summons Nos WA-24F-21–01 of 2019 and WA-24F-280–09 of 2023 for the applicant.
Tan Ai Vee (Hisham Yoong-KC Lim) in Originating Summons

Nos WA-24F-21–01 of 2019 and WA-24F-280–09 of 2023 for the respondent.

Evrol Mariette Peters J:

INTRODUCTION

[1] Two applications were addressed in this judgment. The application in Originating Summons No WA-24F-21–01 of 2019 ('OS No 21') was filed by the respondent in encl 22 to vary the court order dated 29 April 2019; whilst the application in Originating Summons No WA-24F-280–09 of 2023 ('OS No 280') was filed by the applicant. Both applications centred on guardianship, as well as custody, care, and control of the child in question.

[2] Since the issues in both applications were common and intertwined, an order to consolidate them was granted by this court in November 2023.

[3] Given the privacy of parties and sensitivity of issues in these proceedings, the applicants, in OS Nos 21 and 280 have been anonymised in these grounds of judgment as MIL and GEL respectively, whilst the respondent and child in question have been anonymised as MON and NAN respectively.

THE FACTUAL BACKGROUND

[4] In summary, the focal point of contention revolved around a child born out of wedlock. Both the child's biological mother, MON, and half-sister, GEL, had filed respective applications to this court, each seeking guardianship, as well as custody, care, and control of the child.

[5] The applicant in OS No 21 was MIL, the father of three children born from his marriage to one Madam Ong. The three children are a 36-year-old daughter ('GEL'), and two sons, aged 33 and 26, respectively (collectively 'the siblings'). GEL is the applicant in OS No 280.

[6] The narrative began in 2010, when MIL and his then-personal assistant, MON, commenced a romantic relationship. At that time, MIL was separated from Madam Ong. Subsequently, MIL and MON began cohabiting, and in January 2012, they welcomed a daughter ('the child') into their lives.

[7] In 2013, MIL purchased a two-storey semi-detached house ('the family home'). MIL, along with MON, the child, GEL, and the siblings, relocated to the family home. They cohabited in the family home until December 2018, at which point MON departed from the household.

[8] Numerous applications were then filed by both MIL and MON, each

A outlining their claims and concerns. On 29 January 2019, MIL filed an application seeking guardianship, custody, care, and control of the child. This application was rooted in the contention that MON had left the family home, having abandoned the child.

B **[9]** In response, on 31 January 2019, MON filed a similar application under Originating Summons WA-24F-27–01 of 2019 (OS No 27). Subsequently, on 4 February 2019, MON secured interim custody, care, and control of the child through an ex parte application. However, MIL successfully applied to set aside that interim order, resulting in the child's return to the family home on C 14 February 2019.

[10] Ultimately, as a result of MIL's initial application on 29 January 2019, the court issued a comprehensive order on 29 April 2019 ('the court order'), granting MIL both guardianship and custody, along with care and control of D the child.

[11] In June 2022, following MIL's death, his wife, Madam Ong, assumed the role of administratrix of MIL's estate ('the administratrix'). The child E continued to reside at the family home under the care of GEL and the siblings.

[12] A year later, in June 2023, MON filed an application to vary the court order ('the variation application') seeking guardianship, as well as custody, care, and control of the child. Subsequently, in September 2023, GEL filed an F application also for, guardianship, custody, care, and control of the child ('the custody application').

THE ISSUES

G **[13]** The court first had to address the procedural objections raised by GEL, namely whether the variation application was flawed, and whether this court was functus officio after the court order was granted.

[14] On the merits, the issue for consideration in the variation application H was to assess whether there existed material change in circumstances, whilst the primary concern in the custody application centred around determining whether granting guardianship, custody, care, and control of the child to GEL was in the best interest of the child's welfare.

I **[15]** This court additionally needed to assess the necessity of conducting an interview with the child.

[16] The variation application was dismissed whilst the custody application was allowed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether the variation application was procedurally flawed

[17] At the outset, procedural objections were raised by counsel for GEL. His contention was based on perceived flaws in the variation application. The argument posited that, considering MIL's demise, who originally initiated OS No 21, MON should have sought a substitution of MIL with the administratrix. In support of this contention, reference was made to O 15 r 7 of the Rules of Court 2012 ('the Rules of Court'), which reads:

> Order 15 — *Causes of action, counterclaims and parties*
>
> Rule 7 — *Change of parties by reason of death*
>
> (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.
>
> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, *order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party.* An application for an order under this paragraph may be made ex parte. (Emphasis added.)

[18] Counsel for GEL contended that mere service by MON of the notice of application for the variation application and affidavit in support thereof upon the administratrix was insufficient as it did not amount to substitution of the parties.

[19] I found counsel's argument untenable, given that the administratrix had responded to the notice of application by confirming in an *Affidavit Tambahan* dated 27 September 2023, that the administratrix had granted consent and authorisation to GEL to file an affidavit in reply to MON's affidavit in support of the variation application. This by itself was indicative that the administratrix had submitted to the jurisdiction of this court. GEL's affidavit in reply to MON's affidavit in support of the variation application was filed also on 27 September 2023.

[20] As such, while counsel for GEL may be technically correct regarding procedural matters, I found it necessary to dismiss the objection. The principle of 'not being allowed to approbate and reprobate' applied, emphasising that one is not allowed to assert and deny the same position simultaneously, particularly in the context of the variation application.

Whether this court was functus officio with regard to the variation application

[21] Given that the administratrix had granted consent and authorisation for GEL to file an affidavit in reply to MON's affidavit in support of the variation application, which she eventually did on 27 September 2023, GEL was, therefore, deemed to be the party who opposed the variation application.

[22] GEL contended that, in the absence of either an appeal or an application to set aside the court order, this court had become *functus officio*, and was precluded from entertaining the variation application. GEL attempted to fortify her argument by citing cases, including *Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd* [2014] 1 MLJ 422, *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977 MYCA, and invoking O 42 r 13 of the Rules of Court, which reads:

> Order 42 — *Judgment and orders*
>
> Rule 13 — *Setting aside or varying judgment and orders*
>
> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order* or judgment by him. (Emphasis added.)

[23] I found GEL's contention lacking in merit. In family proceedings, an application to vary is permissible under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform (Marriage and Divorce) Act'), as expressly stipulated:

> Section 96 — *Power for court to vary orders for custody or maintenance*
>
> The court *may at any time* and from time to time vary, or may rescind, any order for the custody or maintenance of a child *on the application of any interested person*, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances. (Emphasis added.)

[24] Section 96 of the Law Reform (Marriage and Divorce) Act applies specifically to family proceedings where an interested party is allowed, at any time, and from time to time, to apply for variation of court orders pertaining to spousal and child maintenance, as well as child custody.

[25] Other provisions applicable to variation applications in family proceedings are ss 83, 84, and 97 of the Law Reform (Marriage and Divorce) Act. MON, therefore, was at liberty to file the variation application.

Whether there was material change in circumstances

[26] Having dismissed GEL's procedural objections, the merits of the variation application were addressed. A

[27] Pursuant to section 96 of the Law Reform (Marriage and Divorce) Act, the court may vary an order for custody or maintenance of a child where it is satisfied that there has been any material change in the circumstances. B

[28] The phrase 'material change' has been emphasised in the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184; [2006] 5 CLJ 318 to mean not simply any change, as the operative word is 'material'. Such phrase has also been explained by George Seah SCJ in the Supreme Court case of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297; [1985] CLJU 124; [1985] 1 LNS 124, in the following passage: C

> In our opinion, when an application is made to the court to vary an existing order for maintenance, *the proper approach is to start from the original order and see what changes financial or otherwise*, have taken place since that date including any changes which the court is required to have regard to under s 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible. (Emphasis added.) D E

[29] Further elaboration of 'material change in circumstances' may be found in *Lim Hong Bee v Mah Teck Oon* [2010] MLJU 264; [2010] 8 CLJ 473, where it was stated by Suraya Othman J (as she then was) that 'the change in question must be material and not any change. It means a change in a crucial and vital part. In considering whether there has been any 'material change' within the meaning of this section, all the relevant circumstances must be taken into account'. F

[30] Hence, in examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change *per se* since the court order was granted. The change must be sufficiently material, such that expecting the *status quo* to remain would not be justified. G

[31] It was also crucial to note that the question of whether there was a material change in circumstances is a question of fact, as decided in the High Court case of *Anna Tay Siew Hong v Joseph Ng Tiong Yong* [1995] MLJU 257; [1995] 3 CLJ 717. Reference was made also to the case of *Navarajan a/l Subramaniam v Rajeswary a/p Muniandy* [2019] MLJU 715; [2019] CLJU 1014; [2019] 1 LNS 1014, where it was stated by Hayatul Akmal Abdul Aziz J, in the following passage: H I

> The legal definition of material change in circumstances is not cast in stone. It is ultimately *dependent upon the facts and circumstances of each case*. No one case is like the other. (Emphasis added.)

[32] MON, therefore, had the legal burden to prove material change in circumstances on a balance of probabilities: *YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207; *Ng Say Chuan (h) v Lim Szu Ling (w)and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 37.

[33] In the present case, MON argued that the demise of MIL alone warranted granting guardianship, as well as custody, care, and control to her as the surviving parent. MON's argument was based on s 6 of the Guardianship of Infants Act 1961 ('the Guardianship of Infants Act'), which states:

> Section 6 — *Rights of surviving parent as to guardianship*
>
> On the death of a parent of an infant, *the surviving parent, if any, shall, subject to this Act, be guardian to the infant* either alone or jointly with any guardian appointed by the deceased parent, and — (a) if no guardian has been appointed by the deceased parent; or (b) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent, the Court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent. (Emphasis added.)

[34] In my view, s 6 of the Guardianship of Infants Act did not inherently trigger an automatic reversion of guardianship to MON. The inclusion of the phrase 'subject to this Act' within the section underscores that the court must examine the facts and circumstances of each case. It necessitates an application of legal principles governing family proceedings in determining whether MON should be granted guardianship of the child.

[35] In fact, s 11 of the Guardianship of Infants Act explicitly mandates the Court to prioritise the welfare of the child in its deliberations. This principle serves as the 'golden thread' interwoven throughout all proceedings, directly influencing the interests of children. Section 11 of the Guardianship of Infants Act reads:

> Section 11 — *Matters to be considered*
>
> The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily t*o the welfare of the infant* and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. (Emphasis added.)

[36] Therefore, the court is obliged to take into account both the occurrence of material change in circumstances, and the welfare of the child.

[37] In support of the claim that a material change in circumstances had occurred, MON asserted that the demise of MIL, and the subsequent exclusion of the child as a beneficiary in MIL's estate were pivotal factors. Consequently,

MON contended that the exclusion of the child from the list of MIL's beneficiaries was indicative that the welfare of the child had not been prioritised.

[38] I found this line of argument lacking in merit for the following reasons. Firstly, the mere demise of MIL did not constitute a material change in circumstances. The child had consistently resided with MIL, GEL, and the siblings, receiving care from both MIL and, subsequently, GEL. It remained undisputed that GEL continued providing financially for the child's needs following MIL's demise.

[39] Secondly, contrary to MON's assertion, it was undisputed that the child had indeed been included among the beneficiaries of MIL, as evidenced by the application filed in Originating Summons (ex parte) No WA-31NCvC-2764–08 of 2022.

[40] Thirdly, it was my view that even if the child was excluded from MIL's list of beneficiaries, that fact alone did not constitute a material change in circumstances or even suggest a compromise in the child's welfare.

[41] On the contrary, it was GEL who had consistently covered the child's expenses since MIL's passing, while MON failed to provide any evidence of her contributions. Notably, GEL had prioritised the child's welfare and interests, demonstrated by, *inter alia*, the proactive step of even securing an insurance savings policy for the child's future.

Consideration of the child's welfare

[42] In assessing both the variation application and custody application, the court found it imperative to take into account the welfare of the child, which, as alluded to earlier, was the 'golden thread' throughout these proceedings. This requirement is found not only in the Guardianship of Infants Act, but also in s 88(2) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 88 — *Power of court to make order for custody*
>
> ...
>
> (2) In deciding in whose custody a child should be placed *the paramount consideration shall be the welfare of the child* and subject to this the court shall have regard — (Emphasis added.)

[43] At this juncture, it was crucial to have a comprehensive understanding of the term 'welfare of the child,' as extensively referenced in numerous legal precedents including *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234; [1977] 1 LNS 138, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ

Rep 182, *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586, and *Tan Erh Ling v Ong Khong Wooi* [2021] MLJU 1583; [2021] 1 LNS 1325.

[44] I was also guided by the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, in its reference to the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77, wherein the expression 'welfare of the child' was explained by Chan Sek Keong JC (as he then was), in the following passage:

> The expression 'welfare' is to be taken in its widest sense. It means the general well-being of the child and all aspects of ... *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms. (Emphasis added.)

[45] The Federal Court in *Sean O'Casey Patterson v Chan Hoong Poh & Ors*, through the opinion of James Foong FCJ, proceeded to explain 'welfare of the child' in the following passage:

> [53] According to *Halsbury's Laws of England*, 4th edn, reissue (Mackay edition), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English Children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. *These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved*. Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases. (Emphasis added.)

[46] To reach a well-informed decision, this court had to meticulously examine the notion of the 'welfare of the child' in its most expansive context, considering all pertinent factors and judiciously balance them. Given the distinctive circumstances inherent in each case, offering an exhaustive list of specific considerations is not feasible.

[47] It was evident that GEL possessed the financial resources to adequately support the child. In contrast, MON, a single mother responsible for supporting her son from a previous relationship, failed to disclose her monthly salary and employment details. During the hearing of the Applications, MON's counsel submitted that her client received a monthly salary of MYR6,000. However, no evidence was adduced to support such averment. This omission raised concerns, as there was a high probability that MON lacked the financial means to maintain the child's accustomed lifestyle provided by GEL.

[48] Furthermore, the child's consistent presence in the family home, except for a brief period when MON obtained custody, highlighted the significant role GEL played in the child's physical, emotional, and mental development. Although MON continued to have access to the child, it was undeniable that the child remained dependent on GEL.

[49] Concerns also extended to the potential impact on the child's environment if the variation application was allowed. Based on the evidence adduced, the child's current environment was satisfactory. She not only had the presence of GEL, she also had the support of the siblings and their family. Doubts, however, arose regarding the suitability of MON's home environment for the child's well-being. Unlike GEL, who provided evidence through photographs of her living arrangements, MON failed to demonstrate any arrangements ensuring a comfortable, conducive, and stable living environment for the child. This lack of evidence raised legitimate concerns about the proposed living conditions under MON's care.

[50] GEL further argued that MON led a promiscuous lifestyle, raising concerns about the suitability of such an environment for an 11-year-old girl. While I took the view that this court should not make moral judgments on MON's lifestyle choices, it was crucial to bear in mind that the court's paramount duty was to protect the child's welfare. Hence, this court had to prioritise ensuring a secure, sanitised, and safe environment for the child's upbringing. Regrettably, it was my view that MON had failed to demonstrate her ability to provide such an environment for the child.

[51] MON had also highlighted the impending puberty of the child, asserting that the child would require maternal guidance during this transitional phase, and that MON, being the child's biological mother, averred that she would be the best person to provide such guidance to the child. I had to disagree with this assertion, given that GEL had been a consistent and nurturing mother-figure in the child's life, as she had played a significant role in the child's upbringing.

[52] Additionally, attention was drawn to the concerning incident during the proceedings in OS No 27 and OS No 21. MON had allegedly coerced the child into fabricating a false police report, accusing MIL of molesting the child, leading to MIL's police detention on 14 February 2019. This grave accusation prompted comprehensive medical and psychological examinations of the child, who later confessed to lying about the alleged molestation. The child openly admitted to the presiding judge that she had been influenced by MON to make false accusations, to bolster MON's custody battle with MIL.

[53] This narrative raised serious concerns, especially considering the gravity of sexual abuse allegations in matrimonial proceedings. While the child's admission ultimately vindicated MIL, the incident shed light on MON's willingness to manipulate the child and resort to extreme measures, even at the expense of someone's reputation, to achieve her objectives. Such behaviour painted a troubling picture of MON's character and underscored the potential repercussions of her actions on custodial matters.

[54] All these factors stated above fortified my view that the variation application should be dismissed and the custody application allowed.

Whether the child should have been interviewed

[55] An issue that this court had to address was whether the child should have been interviewed by the judge, as requested by MON. I decided against it for the following reasons.

[56] In making an order for custody, I am mindful that the court shall have regard to the wishes of the child, pursuant to s 88(2)(b) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 88 — *Power of court to make order for custody*
>
> ...
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —
>
> (a) to the wishes of the parents of the child; and
>
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.
>
> ... (Emphasis added.)

[57] Nevertheless, it was important to note that judges are not obligated to conduct interviews with children. Opting not to interview children is a decision that may be deemed appropriate, as its efficacy often hinges on the unique circumstances of each case. It was crucial to acknowledge the inherent constraints of this approach and exercise prudence, recognising that valuable insights may also be gleaned from the parents of the child, and even their solicitors. These alternative avenues provide judges with comprehensive information, alleviating any apprehensions about inadvertently involving children in the complexities of contentious legal proceedings through direct interviews.

[58] In the current context, it was important to emphasise that the request for a judicial interview originated from MON, while GEL exhibited clear

hesitancy. After having evaluated the case history, it was evident that MON had a tendency, as alluded to earlier, to coach the child and encourage dishonesty. This fact played a crucial role in my deliberation regarding whether to interview the child.

[59] Additionally, the child had already gone through an interview by the previous judge in OS No 27, and it was imperative for this court to exercise caution in not unnecessarily involving the child in the legal complexities. Nonetheless, the evidence presented by both MON and GEL, along with the submissions from their respective counsel, provided ample grounds for this court to make a well-informed decision concerning the child's welfare. In reference to this, I sought guidance from a recent case by the Singapore Court of Appeal, namely *WKN v WKN* [2024] SGCA 1. In delivering the court's decision, Debbie Ong Siew Ling JAD, underscored the following in her statement:

> [64] The *judicial interview should not become a step where the court takes a snapshot of an emotional position at a particular point in time* and reaches a decision based on that momentary picture. Information obtained through *other sources would enable the court to have a longitudinal view of the history of the case* and a fuller understanding of the family's relationships and issues. (Emphasis added.)

[60] Similarly, upon delving into the intricacies of the history of this case, and considering the challenges the child had previously encountered, I opted against conducting an interview. Instead, I relied on the ample information already adduced, ensuring a thorough and informed basis for my decision-making process.

CONCLUSION

[61] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, I took the view that there existed no material change in circumstances to justify allowing MON's variation application. Conversely, GEL's custody application was granted, as it aligned with the best interests and welfare of the child.

Application for variation dismissed; application for custody allowed.

Reported by K Selvaraju